

Date: March 22, 1995

Case No. 94-STA-21

SOL No. 94-10312

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,
Prosecuting Party,

and

ERNEST S. BOYLES,
Complainant,

v.

HIGHWAY EXPRESS, INC.
Respondent.

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

On January 14, 1993, Ernest S. Boyles, the Complainant, was discharged as an over-the-road truck driver by Respondent, Highway Express, Inc., for refusal to complete a dispatch. Complainant contends that he was terminated in violation of Section 405(b) of the Surface Transportation Assistance Act (hereinafter "STAA"), 49 U.S.C. app. 2305(b), because the dispatch was illegal under the United States Department of Transportation (hereinafter "DOT")

regulations. Complainant requests payment for lost wages and benefits and attorney fees and costs.¹

The Secretary of Labor, through a duly authorized agent, investigated the complaint, and on January 29, 1994, determined that Boyles' complaint was meritorious. Highway Express Inc. filed a timely appeal on February 25, 1994, and the matter was referred to this office for a formal hearing. Such a hearing was conducted in Charlotte, North Carolina on June 14, 1994, at which time the parties were afforded a full opportunity to present evidence and argument.

Issue

The sole issue to be determined in the matter is whether the dispatch Complainant refused violated the "when" clause of Section 405(b) of the STAA.

Stipulations

1. At all times material herein, Respondent was engaged in interstate trucking operations and maintained a place of business in Richmond, Virginia. In the regular course of this business, Respondent's employees operated commercial motor vehicles in interstate commerce principally to transport cargo. Respondent was a commercial motor carrier.

2. Respondent was at all times material herein a person as defined in Section 401(4) of STAA, 49 U.S.C. Section 2301 (4).

3. Complainant, Ernest S. Boyles, was hired by Respondent on August 24, 1992 as a driver of a commercial motor vehicle, tractor trailer, with a gross weight rating in excess of ten thousand pounds.

4. At all times material herein, Complainant Ernest Boyles was an employee in that he was a driver of a commercial motor vehicle having a gross vehicle weight rating of ten thousand or more pounds used on the highways in interstate commerce to transport cargo, and in that he was employed by a commercial motor carrier and, in the course of his employment, directly affected motor vehicle safety, citing Section 4012 (a) of the STAA, 49 U.S.C. Section 2301 (2)(a).

¹The following citations to the record are used herein:

CX-Complainant's Exhibit

RX-Respondent's Exhibit

Tr.-Transcript

5. Respondent is subject to the United States Department of Transportation, Federal Highway Administration regulations found at 49 C.F.R. Parts 392, 393 and 395.

6. Complainant Ernest Boyles was fired by Respondent on January 14, 1993.

7. On March 9, 1993, Complainant Ernest Boyles filed with the Secretary of Labor a timely complaint of discrimination under the STAA, which complaint was investigated by the Secretary whose investigation resulted in the issuance of the Secretary's Findings and Order adverse to the Respondent on January 29, 1994.

8. The Secretary's Findings and Order of January 29, 1994 were timely objected to by Respondent.

9. Complainant earned \$551.00 per week while employed by Respondent.

10. For the period from January 14, 1993 through March 4, 1994, Complainant earned \$8,417.55, exclusive of unemployment compensation.

Statistics and Distances

1. Complainant made three trips from Richmond, Virginia to Avenel, New Jersey in 7.0, 6.0 and 5.5 hours respectively (DX 5, 7, 10).

2. The trip from Richmond, Virginia to Edison, New Jersey is 312 miles (Tr. 198). The trip from Richmond, Virginia to Avenel, New Jersey is 318 miles (Tr. 198).

3. Exit 10 on route I-295 north leads to Edison. It is six miles from Exit 10 to Respondent's terminal (Tr. 199). Exit 12 on route I-295 north leads to Avenel. It is between one and two miles from Exit 12 to the Avenel warehouse delivery point (Tr. 200). There are eight miles between Exit 10 and Exit 12 on route 295 north. Turnpike speed for this trip is 55 miles per hour; municipal zones are 35 miles per hour; and the speed limit in residential zones is 25 miles per hour (Tr. 200).

Findings of Fact

I. The Parties

1. Complainant, Ernest S. Boyles, has worked in the trucking business as a truck driver for approximately thirty years (Tr. 27). He was hired by Respondent, Highway Express Inc., in August, 1992 as an over-the-road-truck driver (Stipulation No. 3). For the past four years, he has instructed over 1,400 drivers at the Charlotte Truck Driver Training School in Charlotte, North Carolina. Their curriculum included DOT hours-of-service regulations (Tr. 28).

2. Respondent, Highway Express, Inc., is an employer engaged in interstate trucking operations (Stipulation No. 1). Respondent maintains a place of business in Richmond, Virginia, for the principal purpose of transporting goods by commercial motor vehicle in interstate commerce (Stipulation No. 1).

II. The Events Leading Up to Complainant's Termination

3. Complainant reported to work at Respondent's Richmond terminal at 12:00 a.m. on the morning of January 14, 1993 (Tr. 29). Under DOT regulations, Complainant is permitted to work up to seventy (70) hours of on-duty time in any eight-day period. (Tr. 30). This includes time other than driving time (Tr. 30). In the seven-day period preceding the trip in question, Complainant had accumulated 61 hours of on-duty time. He had a remainder of nine available on-duty hours until midnight, January 15, 1993 (Tr. 30).

4. When Complainant reported to the dispatcher, he learned he was scheduled to make a trip to Avenel, New Jersey. (Tr. 31). The trip from Richmond, Virginia to Avenel, New Jersey is 318 miles (Tr. 198). Although the route is left up to the discretion of the driver, the trip is comprised largely of highway driving (Tr. 122). Complainant had made the Richmond-Avenel run three times prior to the trip in question in 7.0, 6.0 and 5.5 hours respectively (DX 5, 7, 10). He expressed concern that he would not have enough remaining on-duty hours to complete his assigned trip (Tr. 31). The dispatcher, Tim Moody, refused to change Complainant's schedule and, in fact, did not have authority to change his schedule (Tr. 31-2, 42).

5. When Complainant made a mechanical check of his truck, he determined that there was a problem with the fifth wheel (Tr. 32). It took him approximately one hour to complete his check and to resolve the problem with the wheel (Tr. 32). This time was logged as on-duty time. Logging this one-hour delay as on-duty time was proper (Tr. 207). Complainant accepted the assignment and left the terminal at approximately 1 a.m. (Tr. 37).

6. Complainant took a half hour break in Bear, Delaware pursuant to DOT rules and regulations and then continued on his route (Tr. 42).

7. At about 7:00 a.m., Complainant called the Richmond terminal to speak with Avid Napier, who was the only person who had authority to change his trip (Tr. 43). Mr. Napier was the supervising dispatcher at the time. However, when Complainant called, no one was at the terminal. He then called Highway's terminal at Edison and told them that he would probably be out of hours by the time he reached the terminal. When Complainant finally got through to Richmond, he spoke with Mr. Allen Dougherty. Complainant explained his situation and requested permission to take the load to Edison (Tr. 44). Mr. Dougherty told Complainant that, if he had time to get to the Edison terminal, then he should take the load directly to Avenel (Tr. 44). Complainant refused (Tr. 45). Mr. Napier got on the phone and Complainant repeated the situation. He again refused to take the load to Avenel, and Mr. Napier told him that he no longer

worked for Highway Express (Tr. 177). Mr. Napier instructed Complainant to take the truck to Edison and leave it. Complainant complied (Tr. 45).

8. The Edison dispatcher, Lenny, initialled Complainant's log book, which indicates an arrival time of 9:00 a.m.(Tr. 46). At that point, Complainant had one half hour of on-duty time available to him.

III. Complainant's Version of the Events which Lead to His Termination

9. Complainant explained what his duties and responsibilities were and would have been had he completed his assigned trip on January 13-14 from Richmond to Avenel. Complainant received his dispatch and proceeded to make a mechanical check of his truck (Tr. 32). This check was considered "on-duty time" (Tr. 207). Complainant was then required to drive the load to its assigned destination, Avenel, New Jersey (Tr. 31). Upon arrival, he had to wait until the terminal was manned (7:00 a.m.) and then back the truck into its assigned bay (Tr. 48). He would then "dolly the truck down, unhook it, secure it, chop it" and ensure that it would be safe for a person to unload it (A person who unloads trucks is called a lumper)(Tr. 49).

10. Complainant was then required to take his truck off the Avenel terminal's property and wait for the lumper to tell him when the trailer was ready to be removed (Tr. 49). It was Complainant's understanding that company policy required the driver to wait until the lumper finished so that the trailer could be removed (Tr. 52)(Compare conflicting testimony of Allen Dougherty at Tr. 148). Complainant would then check the bill of lading and other paperwork and pay the lumper (Tr. 54). Next, he would rehook the trailer, redolly it up, attach the airlines and pull it outside the bay. Finally, Complainant would close and lock the trailer doors and pull the trailer outside the gate (Tr. 54). It generally takes three to four hours to unload a trailer at the Avenel terminal (Tr. 97).

11. It is Complainant's position that he could not have fulfilled all of his responsibilities on the January 13-14 Richmond-Avenel run without running out of hours and, thus, violating the DOL regulations. It is also his position that it would not have been acceptable for him to leave the truck at Avenel after he had run out of hours (Tr. 60)(Compare conflicting testimony of Allen Dougherty at Tr. 148). Therefore, Complainant refused to take the truck to Avenel, and, instead, dropped it at Respondent's Edison terminal (Tr. 45, 86).

12. Complainant was aware that a city driver would pick up his load at Edison and bring it to Avenel (Tr. 85). He also testified that, if it were possible for him to bring the truck to Avenel, there was no reason a city driver could not have met him there and carried out the remainder of his responsibilities (Tr. 87).

13. Complainant testified that he had falsified his logs in the past on trips from Richmond to Avenel (Tr. 38). He had, in fact, been reprimanded for this by Respondent (Tr. 38). Complainant testified that, in his opinion, logging a half hour at the Avenel terminal for

unloading is impossible and illegal (Tr. 38). He stated that he had logged this way in the past to accommodate the company, but that he refused to illegally log his time any more (Tr. 38).

IV. Testimony of James Allen Dougherty

14. James Allen Dougherty is a former dispatcher of Employer, Highway Express (Tr. 141). He was employed by Highway Express from March, 1992 through March, 1994 (Tr. 141). He is presently employed by Kalorrie Express as its terminal manager in Richmond, Virginia (Tr. 140). Mr. Dougherty has been in the trucking business for fourteen years (Tr. 142).

15. Mr. Dougherty instructed Mr. Moody to dispatch Complainant on the Richmond-Avenel run on the evening of January 13-14 (Tr. 142). At that time, Mr. Dougherty understood that Complainant had 7 1/2 hours available to him to make the run (Tr. 143). (Complainant actually had nine on-duty hours available to him at the beginning of the run (Tr. 30)). The company average indicated that drivers generally made the run in 6 1/2 hours, which would leave Complainant with an hour of on-duty time after reaching Avenel (Tr. 143). Mr. Dougherty testified that once Complainant reached Avenel, he would go off duty, and his on-duty hours would no longer be a factor (Tr. 144).

16. Complainant called dispatcher Dougherty at the Richmond terminal at approximately 7:00 a.m. on the morning of January 14 (Tr. 144). Complainant informed him that he had thirty minutes of driving time available to him and that he was presently fifteen minutes south of Edison, New Jersey (Tr. 145). Complainant told Mr. Dougherty that he did not have time to go to Avenel (Tr. 145). Mr. Dougherty instructed him to proceed to Avenel, where he would be relieved of duty (Tr. 145). By the statement "relieved of duty," Mr. Dougherty meant that, upon arrival at Avenel, Complainant would have no responsibility to the company whatsoever (Tr. 145-46).

17. In general, after arriving at Avenel, a driver was required to go to the warehouseman with his bills of lading and be assigned a door to unload. The driver would then back the trailer to the door, drop it, and pull out from under it (Tr. 148). At that point, drivers generally logged off-duty and were relieved from all responsibility until the trailer was empty, when they would rehook it to their truck and drive it off the terminal's property.

18. If a driver arrived at Avenel with no available hours, Mr. Dougherty testified, he would either a) get a road driver to bring the out-of-hours driver's truck to the door or b) send a city driver from the Edison terminal to bring the truck to the door (Tr. 147). Measures were available to ensure that, if a driver ran out of hours, his paperwork and other duties would be handled by someone else so that a violation of hours would not occur (Tr. 148).

19. At the time that Mr. Dougherty spoke with Complainant, he believed that Complainant had enough hours to get to Avenel (Tr. 149). If another driver had to be called in

to finish Complainant's run, Complainant would not have had to wait for that person to take over for him because all of Respondent's trucks were keyed alike (Tr. 163)

20. Mr. Dougherty recounted an instance prior to Complainant's termination where a driver who had run out of hours called in to advise that he was out of hours (Tr. 161). The dispatcher called the terminal and arranged to have someone pick up the trailer (Tr. 161).

21. At no time did Mr. Dougherty suggest that Complainant exceed his on-duty time (Tr. 150).

V. Testimony of Avid Napier

22. Avid Napier is the Manager of line haul and dispatch in Respondent's business (Tr. 171). He has been in that position since Respondent's business began, approximately four 'years ago (Tr. 172). Mr. Napier has been in the trucking business for thirty-five years (Tr. 172).

23. Mr. Napier schedules runs from Richmond to Avenel approximately five to fifteen times per week (Tr. 172). He scheduled Complainant for the trip in question (Tr. 179, 184). He testified that, the run took drivers approximately 6-6 1/2 hours to complete (Tr. 173). Mr. Napier testified that, when scheduling a trip, he takes into account that a driver would log off duty after reaching Avenel (Tr. 184).

24. Mr. Napier testified that, when Complainant called him on the morning of January 14, he was instructed to go to Avenel and log off duty (Tr. 184). Complainant refused to comply with Mr. Dougherty's and Mr. Napier's directive; therefore, he was terminated (Tr. 177).

VI. Testimony of James Belshee

25. James Belshee resides in Orange, Virginia and is employed by Intertrans Carrier Company, a private fleet trucking company, as the director of safety and personnel (Tr. 195-96). Mr. Belshee was also the director of safety and personnel at Highway Express from January, 1992 through April, 1994 (Tr. 196). His responsibilities at Highway Express included regulatory compliance, loss prevention, risk management, security, cargo claims, workers' compensation, group health insurance and various other duties (Tr. 196). Mr. Belshee has 26 years of experience in the trucking industry, mostly in loss prevention and safety (Tr. 197).

26. Mr. Belshee first learned that Complainant had been terminated on the morning of January 14, through a conversation he had with Mr. Napier and Mr. Dougherty (Tr. 202). Mr. Belshee reviewed the decision to terminate Complainant and upheld it (Tr. 202).

27. Complainant was not terminated because he made the same trip in less time prior to this occasion; however, the inconsistency of the instant trip, when compared to other trips

made by Complainant and by other drivers caused Mr. Belshee to affirm the termination (Tr. 204, 213). It was Mr. Belshee's opinion that Complainant had not been completely honest with respect to his record keeping, hours of duty status and the time involved in taking the Richmond-Avenel trip (Tr. 219). In this particular case, Mr. Belshee believed that there was some wrong doing on the part of Complainant (Tr. 203-4).

28. Mr. Belshee did not speak to Complainant, nor did he review Complainant's log for the trip (Tr. 203-5).

29. Mr. Belshee testified that his opinion as to the off-duty loading process at Avenel is as follows: "The driver is relieved of care, custody and responsibility for the equipment and the cargo. He can be relieved from duty for the duration of the time involved in the off-loading process" (Tr. 223). By this, Mr. Belshee understands that a driver is free to pursue activities of his own choosing within reason, taking into consideration the average time necessary to complete the off-loading process (Tr. 224).

30. In upholding Mr. Napier's decision to terminate Complainant, Mr. Belshee was not influenced by what transpired in the telephone call between Complainant and Mr. Napier on the morning of January 14. In addition, he was not influenced by Complainant's refusal to drop the load at the Avenel terminal (Tr. 225).

31. Mr. Belshee did not have final authority to uphold Complainant's termination. After he upheld the decision, it was reviewed by Respondent's Vice President of operations, Jim Ferrell (Tr. 228).

VII. Testimony of John Proctor

32. John Proctor is a former over-the-road-truck driver for Respondent Highway Express. He was employed by Respondent from July, 1992 through February, 1994 (Tr. 107). Mr. Proctor left Highway Express under good terms and has been employed by Archer Daniels Midland since February, 1994 (Tr. 107).

33. Mr. Proctor testified that he made the Richmond-Avenel trip many times in an average time of six hours (Tr. 108). Proctor testified that, upon arrival at Avenel, he generally logged between 15-30 minutes as on-duty, non driving time (Tr. 109). This time reflected the time it would take to deliver his bills of lading, back the truck into the bay, cut the seal, unhook the trailer and pull off the terminal's property (Tr. 109).

34. Mr. Proctor indicated that he logged off duty because he wasn't held responsible for anything during the time the truck was being unloaded (Tr. 111). He did not distinguish between off-duty time in general and time specifically spent in the sleeper berth (Tr. 111).

35. Mr. Proctor testified that drivers at Highway Express were paid by the mile (Tr. 116). Therefore, regardless of whether a driver logged the time during which lumpers unloaded his truck as on or off-duty time, he would not get paid for that period (Tr. 116). However, if that period was logged as on-duty time, a driver would have less hours available during which he could drive and, therefore, be compensated (Tr. 120).

36. Mr. Proctor stated that there were occasions when he told the dispatcher that he would be unable to complete a particular run because he lacked sufficient on-duty hours (Tr. 128). On those occasions, Employer told him to "get on up there and give us a call; we'll call the customer" (Tr. 129). The company asked him to do the best he could and accommodated him (Tr. 129). Mr. Proctor gave several examples where he was compensated for lay overs (Tr. 129-30). He testified that he was never pressured by Highway Express to file his logs any way but legally (Tr. 114).

Discussion

This is an action under the employee protection provisions of the Surface Transportation Act, 49 U.S.C. app. 2305(b). Ernest S. Boyles, the Complainant, an over-the-road driver for Highway Express, Inc., alleges that his termination on January 14, 1993 for refusing to complete a dispatch discriminated against him for engaging in protected activity in violation of the Act because the dispatch he refused to complete was illegal under United States Department of Transportation (hereinafter "DOT") regulations². Boyles filed a complaint with the Secretary, claiming a violation of Section 405(b) of the Act, (49 U.S.C. app. 2305(b)), which prohibits the discharge of drivers who refuse to operate a vehicle under either of the following circumstances: 1) when such operation would constitute a violation of federal law (the "when clause"), or 2) because of the reasonable apprehension of injury to self or the public due to unsafe conditions (the "because clause").³ The issue to be resolved is whether the dispatch refused by Complainant

²49 C.F.R. 395.3(b)(2) states:

No motor carrier shall permit or require a driver of a commercial motor vehicle, regardless of the number of motor carriers using the driver's services, to drive for any period after . . .
 2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates motor vehicles every day of the week.

³Section 405(b) provides in full:

No person shall discharge, discipline or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's

violated the "when" clause of the statute, as Complainant argues.

To establish a *prima facie* violation of Section 405(b) of the STAA, the burden is on Complainant to show 1) that he was engaged in protected activity; 2) that he was subject to adverse action; 3) that there was a causal link between the protected activity and the adverse action of the employer and 4) that the employer knew of the protected activity when it took the adverse action. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987).

I. Complainant was not Engaged in Protected Activity

Complainant received his assignment from dispatch on the evening of January 13, 1993, just before midnight (Tr. 31). At that time he had nine remaining hours of on-duty time until midnight, January 15. The proposed trip from Richmond, Virginia to Avenel, New Jersey took, on average, 6-6 1/2 hours to complete (Tr. 108, 143, 175)⁴. The parties stipulated that it would have taken several hours to unload the trailer (Tr. 51).

Complainant informed dispatcher Tim Moody that he felt he would not have sufficient on-duty hours to complete the run (Tr. 31). Mr. Moody did not have the authority to change his schedule (Tr. 31). Complainant accepted the assignment and prepared to leave. While making a mechanical check of his truck, Complainant discovered a problem with the fifth wheel (Tr. 32). It took approximately one hour for him to complete the check of the truck and resolve the problem with the wheel (Tr. 33-6).

Complainant left the terminal at 1:00 a.m. on January 14, 1993 (Tr. 37). He stopped for a half hour off-duty break in Bear, Delaware (Tr. 42). He continued the run and stopped around 7:00 a.m. to inform dispatch that he would probably be out of hours by the time he reached the terminal (Tr. 43). He requested permission to drop the load at Respondent's Edison terminal. Permission was denied, and Complainant was instructed to continue to the customer's Avenel terminal, where he would be relieved of duty (Tr. 145). Complainant refused and was terminated (Tr. 177).

At that point, Complainant had 2 1/2 hours of on-duty time available to him and was approximately 75 miles from Edison (Tr. 94). There are 8 miles between the Edison exit and the

apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bone fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

⁴Messrs. Proctor, Dougherty and Napier testified that the trip from Richmond to Avenel would take between 6-6 1/2 hours. Mr. Belshee testified that it would take approximately 7 1/2 hours (Tr. 200-1).

Avenel exit and 1-2 miles from the Avenel exit to the terminal (Statistics and Distances No. 3). Therefore, at 7:00 a.m., Complainant would have had to drive 85 miles to arrive at the Avenel terminal in 2 1/2 hours. The speed limit for all but two of those miles was 55 mph (Statistics and Distances No. 3). The evidence indicates that there is no doubt that, barring an accident, Complainant could have arrived at the Avenel terminal within his remaining on-duty hours⁵. Consequently, the question to be decided is whether additional duties would have been required of him upon arrival and how long those duties would have taken to complete.

II. Requirements and/or Duties to be Performed by Complainant upon Arrival at Avenel

Generally, upon arrival at the Avenel terminal, drivers were required to perform several additional duties. Upon arrival, a driver would turn over the bills of lading for the load he was carrying to the warehouse man (Tr. 148). He would then be assigned a bay and was responsible for backing the truck into the bay (Tr. 49). The driver would cut the seal, unhook the trailer, and pull the truck off the terminal's property (Tr. 109).

All parties are generally agreed as to the driver's duties thus far. However, there is some confusion as to the duties and the responsibilities of the driver at this point. It is Complainant's position that Respondent's company policy requires a driver to remain with the truck in readiness to remove the trailer from the customer's dock either in the event of an emergency or when the lumber is finished (Tr. 52, 55). Complainant testified that the driver is the only person designated to move the trailer (Tr. 52). This time, according to Complainant, is considered on-duty time (See definition of *on-duty* as defined by 49 C.F.R. 395.2).⁶

⁵Complainant's testimony that he did not have the available on-duty hours to go to Avenel (Tr. 86) is simply not credible in light of an examination of the distances involved coupled with the time he had available to him. It is apparent that, based on his undisputed arrival time of 9:00 a.m. at the Edison terminal with thirty minutes of on-duty time available to him, Complainant could have lawfully travelled the additional six miles it would have taken him to arrive at Avenel had he not gone to Edison. (See Statistics and Distances No. 3. It is six miles from Exit 10 on I-295N to the Edison terminal. It is twelve miles from Exit 10 on I-295N to the Avenel terminal. Complainant drove six miles to the Edison terminal and arrived at 9:00 a.m. Had he not done so, and continued to Avenel direct, he would likely have reached the terminal before 9:30).

⁶Section 395.2 reads as follows:

On-duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. *On-duty time* shall include:

- 1) All time at a carrier or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;
- 2) All times inspecting equipment as required by §§ 392.7 and 392.8 of this chapter or

Respondent's employees and former employees testified that drivers normally log off duty the moment they arrive at Avenel (Tr. 147). Mr. Dougherty testified that a driver has to "get out of the truck, turn the paperwork in, drop the trailer and go to bed" (Tr. 158). When scheduling trips, Mr. Napier stated that he took into consideration the fact that drivers log off duty when they get to Avenel (Tr. 184). Former driver John Proctor testified that, when he arrived in Avenel, he generally unhooked the trailer, went to get breakfast, and then went to sleep (Tr. 110). He went on to state that, regardless of whether he was in the sleeper berth or somewhere else, he still logged the time as off duty because he was not responsible for anything (Tr. 111).

It appears that, through strict construction of the regulation, both Complainant and Respondent are correct in their interpretations of how a driver should log his time. If a driver remained with his truck, in readiness to operate the vehicle, he would log that time as on duty. *See* 49 C.F.R. 395.2 (5). If, however, he retired to the sleeper berth, that time would be considered off duty. *See* 49 C.F.R. 395.2(4). If a driver went to get something to eat or engaged in other activities not defined by 49 C.F.R. 395.2, that time would be off duty.

It seems unlikely that company policy required a driver to remain with his truck at Avenel, as three of Respondent's current and former employees alike testified that it was customary for drivers to log off duty upon arrival at the terminal. It is especially telling that two of the three witnesses are no longer with the company, and they have nothing to gain or lose by their testimony. Therefore, I find that it was company policy and normal practice that a driver was not required to remain with his truck. If, however, a driver elected to remain with his vehicle in readiness to move it, he should, of course, log that time as on-duty time.

Regardless of what Complainant thought was required of him upon arrival at Avenel, the facts of this case render his perceptions moot. Complainant had sufficient time to drive the load from Richmond to Avenel without violating DOT rules regarding maximum hours. He may or may not have run out of hours at the Avenel terminal, depending on what course of action he

otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

3) All driving time as defined in the term *driving time* in this section;

4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth as defined by the term *sleeper berth* of this section;

5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

6) All time spent performing the driver requirements of §§392.40 and 392.41 of this chapter relating to accidents.

7) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle;

8) Performing any other work in the capacity of, or in the employ or service of, a common, contract, or private motor carrier; and

9) Performing any compensated work for any nonmotor carrier entity.

chose when he got there; i.e., he could have remained on-duty, in readiness to move the trailer, or logged off duty and either slept in the sleeper berth or went to get something to eat⁷. However, at 7:00 a.m., when he last spoke to the Richmond dispatcher, Complainant was advised that, once he arrived in Avenel, Respondent would ensure that he was immediately relieved of duty (Tr. 145, 177, 184). The evidence conclusively proves that it was possible for measures to be taken to avoid a violation of Complainant's maximum hours (See Findings of Fact Nos. 18, 19, 36)⁸. In fact, Complainant himself admits that, if he had had enough hours available to get the truck to Avenel, there would have been no reason why a city driver could not have taken over there (Tr. 87). Complainant made his call at 7:00 a.m. and did not arrive in Edison until 9:00 a.m. Had he continued to Avenel, he would have arrived slightly later. Respondent had two hours to arrange for a driver to relieve Complainant at the Avenel terminal. In fact, even if Respondent was not able to locate a driver in this time, Mr. Dougherty testified uncontradicted that, because all of Respondent's trucks were keyed alike, Complainant would not have had to wait for the replacement (Tr. 163).

Based on these facts, I find that Complainant did not engage in a protected activity. The fact that Complainant believed in good faith that, if he continued to the Avenel terminal and

⁷Complainant argues that this case is controlled by Transfleet Enterprises Inc. v. Boone, 987 F.2d 1000, 1003 (4th Cir. 1992), which he cites for the proposition that a violation of the Act may be shown even though the driver was not out of hours at the time of dispatch, but "at the scheduled start of the trip, it was apparent that the delivery could not have been legally made on time." In the instant case, the delivery could have been made on time. See Statistics and Distances No. 3; Findings of Fact No. 3. As Complainant was not required by the company to remain with his truck in an on-duty status during the time it was being unloaded, it would be improper to find that the trip was illegal from the outset, although there is some question as to whether Complainant would have had any available time to remove the trailer from the customer's terminal when the unloading process was complete. However, based on past records of Complainant and others, barring an accident or unexpected and prolonged traffic delays, Complainant would have been able to finish the delivery within the nine hours available to him.

⁸Complainant's bald assertion that he could not have simply left the truck at Avenel (Tr. 60) is unsupported by other testimony in this case. Mr. Dougherty testified as to plausible alternatives available to Complainant should he have run out of hours on arrival at Avenel. (See Findings of Fact No. 18, 19.) Mr. Dougherty offered an alternative to Complainant during their 7:00 a.m. phone call on January 14 (Finding of Fact No. 16). Complainant did not offer any rebuttal evidence to the effect that Mr. Dougherty's alternatives were not practicable. In addition, former driver John Proctor described situations where he had run out of hours and was accommodated by the company in similar situations. (See Finding of Fact No. 36.) I find Mr. Proctor's testimony to be persuasive because it draws on specific experiences. In addition, Mr. Proctor and Mr. Dougherty are more credible than Complainant because they no longer work for Respondent and have no obvious bias one way or the other.

fulfilled his duties there, he would be in violation of the regulations offers him no protection⁹. He is only entitled to refuse a dispatch if he is 1) out of hours at the time of dispatch or 2) at the scheduled start of the dispatch it is apparent that it would be impossible for him to complete delivery in the allotted time. As a result, I find that Complainant has failed to sustain the burden of proving the first element of his *prima facie* case and that his claim must be denied.

Recommended Order

IT IS ORDERED that:

Complainant's claim is denied.

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/LMF
March 22, 1995
Newport News, Virginia

⁹The Secretary has held that Section 405(b) protects a driver who refuses a dispatch "when such operation constitutes a violation of any Federal rules." (Emphasis added). This interpretation is deemed correct "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." Boone, 987 F.2d at 1004, *citing* Rust v. Sullivan, 111 S.Ct. 1957, 1767 (1991).

It is clear in the language of the statute that the "when clause" protects a driver when he refuses to make an actual violation of the law. The argument that an actual violation is required is strengthened by the construction of the "because clause" which immediately follows the "when clause." The "because clause" requires drivers to have a "reasonable apprehension" on the driver's part to invoke the protection of the statute. If it were Congress' intent to provide for a subjective interpretation in the "when clause," it could have done so. As Congress has not so provided, it is evident that, to invoke the protection of the "when clause," an actual violation of the law must occur or it must be apparent at the start of a trip that it would be impossible to complete the trip without violating the law.